

Federal Jurisprudence—The First Circuit Construes Plurality Opinions to Expand the Reach of the Clean Water Act—*United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 128 S. Ct. 375 (2007)

The Clean Water Act (CWA) extends federal protection to “navigable waters,” which it broadly defines as “the waters of the United States, including territorial seas.”¹ In *Rapanos v. United States*,² the Supreme Court attempted to define the standard for determining the CWA’s reach over wetlands but, unable to reach a majority opinion, issued a fragmented plurality decision setting forth conflicting legal standards.³ To identify *Rapanos*’s controlling legal standard, some courts invoke the narrowest ground formula while others adopt Justice Stevens’s instructions set forth in his *Rapanos* dissent.⁴ In *United States v. Johnson*,⁵ the First Circuit Court of Appeals considered which of these formulas it should invoke in construing *Rapanos*.⁶ The First Circuit adopted Justice Stevens’s instructions and directed lower courts to find CWA jurisdiction over wetlands that satisfy either standard set forth in *Rapanos*.⁷

1. 33 U.S.C. § 1362(7) (2006) (defining navigable waters); *see also id.* § 1342(a) (prohibiting discharge of pollutants into navigable waters without permit).

2. 126 S. Ct. 2208 (2006).

3. *See Rapanos v. United States*, 126 S. Ct. 2208, 2226 (2006) (plurality opinion) (requiring “continuous surface connection” between wetlands and “waters of the United States”); *id.* at 2236 (Kennedy, J., concurring) (requiring “significant nexus” between wetlands and navigable waters); *id.* at 2265 (Stevens, J., dissenting) (concluding CWA jurisdiction if site in question satisfies either plurality’s or Justice Kennedy’s test). Since Congress enacted the CWA in 1972, the United States Supreme Court has reviewed various standards for determining whether CWA jurisdiction extends to wetlands. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167-68 (2001) (extending CWA jurisdiction over nonnavigable waters having “significant nexus” with navigable waters); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-34 (1985) (recognizing CWA jurisdiction over wetlands bordering or “in reasonable proximity to” United States waters); *see also* Bradford C. Mank, *Implementing Rapanos—Will Justice Kennedy’s Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291, 291 (2007) (discussing unresolved question of CWA jurisdiction over wetlands); James Murphy, *Muddying the Waters of the Clean Water Act: Rapanos v. United States and the Future of America’s Water Resources*, 31 VT. L. REV. 355, 357 (2007) (explaining courts’ interpretation of navigable waters extends beyond term’s conventional meaning); Ryan Fortin, Comment, *Rapanos v. United States—A Historical Perspective on the Recent Decline in “Judicial Pioneering” in Wetlands Regulation*, 33 WM. MITCHELL L. REV. 1225, 1227-28 (2007) (observing evolving standards for CWA protection of wetlands).

4. *Rapanos v. United States*, 126 S. Ct. 2208, 2265 (2006) (Stevens, J., dissenting) (upholding CWA jurisdiction under plurality’s and Justice Kennedy’s test); *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)) (setting forth “narrowest ground” test); *see also infra* notes 24-25 and accompanying text (explaining “narrowest ground” formula). *See generally* Rina Eisenberg, *Recent Developments in Environmental Law*, 20 TUL. ENVTL. L.J. 459, 460 (2007) (describing lower courts’ confusion over *Rapanos* decision); Amanda Bronstad, *Wetlands Protection Muddied by Court Rulings Year After Key Case, Definition Unclear*, NAT’L L.J., June 25, 2007, at col. 1 (illustrating conflicting application of *Rapanos* in lower courts).

5. 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 128 S. Ct. 375 (2007).

6. *See id.* at 60 (evaluating legal standards for determining CWA jurisdiction).

7. *See id.* at 66 (adopting Justice Stevens’s approach).

In 1999, the United States filed a civil action alleging that a group of cranberry farmers violated the CWA by discharging dredge and fill materials into federally regulated waters without a permit.⁸ The three wetlands at issue were linked to a navigable-in-fact river by non-navigable streams, creeks, or ditches.⁹ The United States District Court for the District of Massachusetts found that the hydrological connection between the three wetlands and the navigable water established a sufficient basis for CWA jurisdiction and granted summary judgment in favor of the government.¹⁰ The First Circuit affirmed the district court's ruling and issued a panel decision upholding CWA jurisdiction over the wetlands.¹¹

Shortly after the First Circuit delivered its panel decision, the Supreme Court decided *Rapanos v. United States*, which also concerned CWA jurisdiction over wetlands.¹² In response to the *Rapanos* decision, the *Johnson* litigants requested a rehearing and asked the First Circuit to apply the proper legal standard for determining CWA jurisdiction over wetlands.¹³ Perplexed by the *Rapanos* holding, the First Circuit, on rehearing, sought to decipher the fragmented decision and extract the controlling legal standard.¹⁴ The court considered various interpretations and ultimately adopted Justice Stevens's instruction to find jurisdiction if the wetlands satisfy either the standard of the *Rapanos* plurality or its concurring Justice.¹⁵

The United States Supreme Court has struggled to define the CWA's reach

8. See *United States v. Johnson*, 437 F.3d 157, 159-60 (1st Cir. 2006) (stating appellants discharged pollutants into wetlands in Carver, Massachusetts), *vacated*, 467 F.3d 56 (1st Cir. 2007).

9. *United States v. Johnson*, 437 F.3d 157, 161 (1st Cir. 2006) (describing wetlands in question "hydrologically connected" to navigable-in-fact Weweantic River), *vacated*, 467 F.3d 56 (1st Cir. 2007). The court explained that the three wetlands, which were adjacent to tributaries of the navigable-in-fact river, were hydrologically connected to the river because water from the wetland sites eventually drained into the river. *Id.* The court defined a "navigable-in-fact" water body as one on which navigation—boat or ship traffic—does or could take place. *Id.* at 161 n.3. For jurisdictional purposes, the CWA equates "navigable waters" with "waters of the United States." *Id.* However, because some "waters of the United States" are not navigable-in-fact, "navigable waters" for CWA purposes may not be navigable-in-fact. *Id.*

10. See 467 F.3d at 58 (outlining district court's decision).

11. See *United States v. Johnson*, 437 F.3d 157, 181 (1st Cir. 2006) (noting hydrological connection links nonadjacent wetlands with navigable-in-fact river), *vacated*, 467 F.3d 56 (1st Cir. 2007).

12. See *Rapanos v. United States*, 126 S. Ct. 2208, 2220 (2006) (plurality opinion) (considering whether wetlands constitute "waters of the United States" pursuant to CWA); see also 467 F.3d at 57 (indicating conflict between *Johnson* panel decision and *Rapanos*). Noting that *Solid Waste Agency* did not address nonadjacent wetlands, the *Rapanos* Court reviewed the standard for establishing CWA jurisdiction over wetlands which are not immediately adjacent to navigable waters. See *Rapanos v. United States*, 126 S. Ct. 2208, 2217-18 (2006) (plurality opinion).

13. See 467 F.3d at 60 (outlining appellants' argument). The appellants noted that, like those in *Rapanos*, the wetlands in question were not immediately adjacent to navigable waters. See *id.* Appellants challenged the panel's decision that a hydrological connection constitutes a significant nexus under *Rapanos*. *Id.*

14. *Id.* at 60-62 (characterizing lower courts' inconsistent application of *Rapanos*). The court also detailed *Rapanos*'s split decision. *Id.* at 59-60.

15. *Id.* at 66 (vacating and remanding panel decision and invoking Justice Stevens's instructions).

and has offered both liberal and narrow interpretations.¹⁶ In particular, the Court has struggled to devise a definitive legal standard for determining whether the CWA applies to wetlands.¹⁷ The Court attempted to resolve this ambiguity in *Rapanos*, but failed to render a majority opinion and instead issued a fragmented plurality decision.¹⁸ Justice Scalia authored the four-Justice plurality opinion limiting CWA jurisdiction to wetlands with a “continuous surface connection” to “relatively permanent, standing or continuously flowing” water bodies.¹⁹ In his lone concurring opinion, Justice Kennedy concluded that CWA jurisdiction should extend to wetlands that possess a “significant nexus” to navigable waters.²⁰ Finally, authoring the four-Justice dissenting opinion, Justice Stevens directed courts to find CWA jurisdiction if the wetland at issue satisfies either the plurality’s or Justice Kennedy’s test.²¹

When the Supreme Court issues a fragmented plurality opinion, lower courts often struggle to extract the controlling legal standard.²² One method of

16. See Fortin, *supra* note 3, at 1239-42 (analyzing period of liberal CWA construction). In the first years after the CWA’s enactment, the Supreme Court construed the Act’s jurisdictional boundaries to the broadest extent possible under the Commerce Clause. *Id.* at 1241; see also Taylor Romigh, Comment, *The Bright Line of Rapanos: Analyzing the Plurality’s Two-Part Test*, 75 *FORDHAM L. REV.* 3295, 3302 (2007) (illustrating *Solid Waste Agency’s* broad and narrow holdings). Under *Solid Waste Agency’s* narrow holding, the CWA covers isolated wetlands when a hydrological connection exists between the wetland and the navigable water, but not if the connection is purely ecological or based on migratory bird patterns. Romigh, *supra*, at 3302. A broad reading of *Solid Waste Agency*, however, calls for a “significant nexus” such that the wetland in question must either be navigable itself or directly adjacent to navigable water. *Id.*; see Kevin P. Pechulis, *Scope of “Waters of the United States” Unclear After Rapanos v. United States*, 38 *A.B.A. TRENDS* 4, 4 (2006) (asserting *Solid Waste Agency* undercut *Riverside’s* broad application of CWA jurisdiction). Compare *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-34 (1985) (upholding CWA jurisdiction over adjacent wetlands bordering or in proximity to United States waters), with *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001) (requiring “significant nexus” between wetlands and navigable waters). The *Solid Waste Agency* Court refused to extend CWA coverage to isolated ponds despite their indirect ecological impact on navigable waters. See *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 168 (2001).

17. See Fortin, *supra* note 3, at 1258 (contending *Solid Waste Agency* did not define CWA jurisdictional limits). While the *Solid Waste Agency* Court held that bird migration between an isolated pond and a navigable water does not establish CWA jurisdiction over the isolated pond, it failed to set forth categorical limits of the CWA’s reach. See *id.*; see also Margaret B. Hinman, *Clean Water Act Jurisdiction: Are the Muddy Waters Clearing?*, 50 *ADVOC.* 13, 13 (2007) (explaining confusion over proper jurisdictional test).

18. See *Rapanos v. United States*, 126 S. Ct. 2208 (2006) (rendering plurality, concurring, and dissenting opinions); see also *infra* notes 19-21 and accompanying text (detailing three *Rapanos* opinions).

19. See *Rapanos v. United States*, 126 S. Ct. 2208, 2213, 2221 (2006) (plurality opinion) (extending CWA jurisdiction to wetlands only if no clear demarcation between waters and wetlands).

20. See *Rapanos v. United States*, 126 S. Ct. 2208, 2249 (2006) (Kennedy, J., concurring) (setting forth case-by-case framework). Justice Kennedy suggested that a mere hydrological connection between wetlands and navigable waters is neither required nor sufficient in itself to establish jurisdiction. *Id.* He also explained that a significant nexus exists when the wetlands, either alone or in combination with the surrounding environment, “significantly affect the chemical, physical, and biological integrity” of navigable waters. *Id.* at 2248.

21. See *Rapanos v. United States*, 126 S. Ct. 2208, 2265 (2006) (Stevens, J., dissenting) (predicting dissenting Justices would uphold jurisdiction under both tests).

22. See Murphy, *supra* note 3, at 364 (explaining *Rapanos* lacks majority opinion). Although five justices

deciphering a fragmented decision is to invoke the formula set forth in *Marks v. United States*,²³ which treats the controlling legal standard as the “position taken by those Members who concurred in the judgments on the narrowest grounds.”²⁴ Depending on the court, the “narrowest ground” may be the opinion least restrictive of federal regulation, the opinion based on less far-reaching grounds, or the opinion that is a subset of another opinion.²⁵ Justice Stevens’s approach, however, is an alternative method that instructs lower courts to find CWA jurisdiction when the wetland satisfies either the *Rapanos* plurality’s or Justice Kennedy’s test.²⁶ According to Justice Stevens, this approach ensures a working majority of at least five voting Justices.²⁷ That is, all four dissenting Justices would uphold CWA jurisdiction under either the plurality’s or Justice Kennedy’s test.²⁸

agreed on a judgment in *Rapanos*, the Court lacked a majority consensus because Justice Kennedy’s rationale drastically differed from that of the plurality. *Id.*

23. 430 U.S. 188 (1977).

24. *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 159 n.15 (1976)) (explaining narrowest ground formula); *see also* *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (applying *Marks* to determine *Rapanos*’s controlling legal standard); *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029-30 (9th Cir. 2006) (using *Marks* to find narrowest ground in *Rapanos*). *But see, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (holding *Marks* test inapposite in cases without overlapping rationales); *Nichols v. United States*, 511 U.S. 738, 745-46 (1994) (noting *Marks* test difficult and stating courts should not follow it to “utmost logical possibility”); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (deeming *Marks* unworkable except where overlapping reasoning among opinions). The *King* court deemed *Marks* workable only where one opinion is narrower in the sense that it is a “logical subset of other, broader opinions.” *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

25. *See, e.g.*, *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006), (construing narrowest ground as ground least restrictive of federal authority); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (treating narrowest ground as least common denominator or logical subset); *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006) (considering less far-reaching opinion as narrowest ground).

26. *See Rapanos v. United States*, 126 S. Ct. 2208, 2265 & n.14 (2006) (Stevens, J., dissenting) (setting forth instructions for lower courts to determine CWA jurisdiction over wetlands).

27. *See Rapanos v. United States*, 126 S. Ct. 2208, 2265 (2006) (Stevens, J., dissenting) (counting dissenting Justices in forming majority consensus); *see also* Mank, *supra* note 3, at 343-44 (noting while Justice Stevens’s instructions consider dissenting views, *Marks* formula precludes consideration of dissenting opinion). *Compare* *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc) (proscribing inclusion of dissenting opinions in determining narrowest ground), *with* *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2607 (2006) (considering concurring and dissenting opinions in finding majority rationale), *and* *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001) (permitting inclusion of dissenting viewpoint in reconciling fragmented decisions).

28. *Rapanos v. United States*, 126 S. Ct. 2208, 2265 (2006) (Stevens, J., dissenting) (presuming Justice Kennedy’s approach will control in most cases). In most cases, Justice Kennedy’s test will permit more extensive CWA regulation so that any situation satisfying the plurality’s test will also satisfy Justice Kennedy’s test. *Id.* In the rare case, where the circumstances satisfy the plurality’s test but not Justice Kennedy’s test, Justice Stevens advises lower courts to uphold jurisdiction. *Id.*; *see also* Matthew A. MacDonald, Comment, *Rapanos v. United States and Carabell v. United States Army Corps of Eng’rs*, 31 HARV. ENVTL. L. REV. 321, 328 (2007) (explaining rare situation where wetland satisfies plurality’s test but not Justice Kennedy’s test). Where a wetland is connected to navigable waters through a relatively permanent stream with an insignificant flow, the plurality and the dissent would find jurisdiction, but Justice Kennedy may not. MacDonald, *supra*, at 328. To resolve this unusual result, Justice Stevens advises lower courts to find jurisdiction if the wetland in

Lower courts have employed both the *Marks* formula and Justice Stevens's instructions to decipher *Rapanos* and extract a legal standard for establishing CWA jurisdiction over wetlands.²⁹ Using the *Marks* formula, the Seventh and Ninth Circuit Courts of Appeals concluded that Justice Kennedy's significant nexus test was the narrowest ground and therefore the controlling legal standard.³⁰ Because the plurality and concurring opinions do not overlap in *Rapanos*, other courts find the *Marks* formula inapposite as applied to the *Rapanos* decision.³¹ Those courts have adopted Justice Stevens's instructions and consider both the plurality's and Justice Kennedy's test to determine CWA jurisdiction.³²

In *United States v. Johnson*, the First Circuit Court of Appeals adopted Justice Stevens's instructions and held that the government may prove CWA jurisdiction using either Justice Kennedy's or the *Rapanos* plurality's test.³³ According to the court, Justice Stevens's instructions provide a useful alternative to the *Marks* formula, which does not easily translate to the *Rapanos* decision.³⁴ In fact, the court cited several cases in which the Supreme Court

question satisfies either test. *Id.*

29. See *infra* notes 30-31 and accompanying text (describing cases using *Marks* formula or Justice Stevens's test). See generally MacDonald, *supra* note 28, at 328 (observing lower courts' split but favoring Justice Kennedy's or Justice Stevens's opinion).

30. See *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) (using *Marks* "narrowest ground" test); *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1025 (9th Cir. 2006) (following Justice Kennedy's test). The *Gerke* court concluded that Justice Kennedy's opinion prescribing the significant nexus test was "narrower" than the plurality's opinion with respect to limiting federal authority because, in most cases, Justice Kennedy's significant nexus test would confer greater federal authority over wetlands and nonnavigable waters. *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006). The court reasoned that as applied in future cases, Justice Kennedy's opinion will command the support of five Justices. *Id.* at 725. If Justice Kennedy finds CWA jurisdiction, at a minimum, the four dissenting Justices will also find jurisdiction; in *most* cases, if Justice Kennedy rules against federal authority, he will garner the support of the four plurality Justices. *Id.* The court noted, however, that in the rare case that a slight and insignificant, but *continuous* surface connection links a wetland to a navigable water, this foregoing result may not follow. *Id.* at 725. In that case, the four dissenting Justices and the four plurality Justices would find CWA jurisdiction and outvote Justice Kennedy eight to one. *Id.*

31. *Accord* *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (concluding *Marks* test unworkable because no overlapping opinions); see *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006) (suggesting no narrowest ground in *Rapanos*); see also *Rapanos v. United States*, 126 S. Ct. 2208, 2265 (2006) (Stevens, J., dissenting) (noting plurality and concurring opinions set forth distinct legal tests). *But cf.* *Memoirs v. Attorney Gen. of Mass.*, 383 U.S. 413, 441 (1966) (Clark, J., dissenting) (stating no majority opinion in case considering whether First Amendment protects obscene speech). In *Marks*, the Court sought to clarify *Memoir's* overlapping opinions by applying the narrowest ground formula. See *Marks v. United States*, 430 U.S. 188, 193 (1977).

32. See, e.g., *United States v. Cundiff*, 480 F. Supp. 2d 940, 944 (W.D. Ky. 2007) (invoking Justice Stevens's approach); *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 226-27 (D. Conn. 2007) (adopting Justice Stevens's instructions); *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006) (noting plurality's and Justice Kennedy's divergent legal standards). *But see* *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006) (rejecting *Rapanos* and relying on precedent in Fifth Circuit).

33. 467 F.3d at 65, 66 (deeming Justice Stevens's instructions both "simple and pragmatic").

34. See *id.* at 63-64 (explaining narrowest ground test only resolves decisions containing overlapping

disregarded the *Marks* formula altogether.³⁵ The First Circuit also reasoned that Justice Stevens's approach ensures that lower courts will find CWA jurisdiction in all cases where a majority of the *Rapanos* Court would find jurisdiction.³⁶ It rejected the notion that in extracting a legal standard, lower courts should ignore dissenting opinions.³⁷ Instead, the First Circuit held that with respect to *Rapanos*, lower courts must examine the points of commonality among *all* Justices, and concluded that Justice Stevens's approach best serves this objective.³⁸

In *United States v. Johnson*, the First Circuit sensibly deviated from the *Marks* norm by invoking Justice Stevens's instructions in *Rapanos*.³⁹ As applied to the *Rapanos* decision, Justice Stevens's instructions afford a logical and pragmatic approach to extracting the decision's controlling legal standard.⁴⁰ Though most courts that follow the *Marks* formula conclude that Justice Kennedy's opinion is the narrowest ground, their reasoning is flawed and illogical.⁴¹ While *Marks* is logical in cases involving overlapping opinions, it does not translate to the *Rapanos* decision, which sets forth distinct legal standards.⁴² In contrast, Justice Stevens's rationale, which purports to find a

opinions). The *Marks* formula is unworkable as applied to *Rapanos* because the concurring and plurality opinions set forth distinct legal standards. *Id.*

35. *Id.* at 65-66 (noting recent Supreme Court decisions undermining *Marks* approach); *see also supra* note 24 and accompanying text (discussing *Marks* and Court's critique of its holding).

36. *See* 467 F.3d at 64 (explaining Justice Stevens's reasoning); *see supra* notes 26-28 and accompanying text (detailing how Justice Stevens's dissent ensures working majority).

37. *Id.* at 65-66 (describing recent Supreme Court decisions questioning *Marks* approach (citing *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2607 (2006); *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001)). The *Johnson* court pointed out that in various cases, the Supreme Court instructed lower courts to consider plurality, dissenting, and concurring opinions in order to extract principles shared by a majority. *Id.*

38. *Id.* at 65-66 (requiring lower courts follow Justice Stevens's instructions).

39. *Id.* at 65-66 (rejecting *Marks* test in favor of Justice Stevens's instructions); *see also supra* note 34 and accompanying text (describing courts rejecting *Marks* test and using Justice Stevens's approach).

40. *See* 467 F.3d at 65-66 (contrasting *Rapanos* with cases conducive to *Marks* test); *see also supra* note 34 and accompanying text (explaining why *Marks* inapposite as applied to *Rapanos*).

41. *See supra* note 24 and accompanying text (detailing application of *Marks*). The Ninth Circuit Court of Appeals held that Justice Kennedy's opinion was the narrowest ground simply because he concurred in the *Rapanos* decision to vacate and remand, but ignored the substantive differences between Justice Kennedy's and the plurality's legal standards. *See N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006); *cf. United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006) (defining narrowest ground less far-reaching ground but invoking Justice Stevens's instructions). The *Evans* court generally defined the term "narrowest grounds" as the "less far-reaching" opinion, but could not determine whether Justice Kennedy's or the plurality's opinion was less far-reaching and therefore applied Justice Stevens's approach. *United States v. Evans*, No. 3:05 CR 159 J 32HTS, 2006 WL 2221629, at *19 (M.D. Fla. Aug. 2, 2006).

42. *See* 467 F.3d at 63-64 (discussing cases to which *Marks* applies); *see also supra* notes 31-32 and accompanying text (discussing courts holding *Marks* inapplicable where no overlapping opinions). An example of why the *Marks* approach is most useful in cases involving overlapping opinions is when the formula clarified a fragmented decision which considered whether the First Amendment protects obscene speech. 467 F.3d at 62 (citing *Memoirs v. Attorney Gen. of Mass.*, 383 U.S. 413, 418 (1966)). In *Memoirs*, a three-Justice plurality held that the First Amendment does not protect obscene speech but concluded that the

common ground that at least five Justices share, logically applies to *Rapanos*.⁴³

Interestingly, whether a court uses Justice Stevens's instructions or the *Marks* formula, the result will often compel the application of the significant nexus test to determine CWA jurisdiction over wetlands.⁴⁴ The *Marks* formula inevitably leads courts to apply Justice Kennedy's test, while Justice Stevens's instructions allow courts to apply *both* the plurality's and Justice Kennedy's legal standards.⁴⁵ Yet, whether a court uses the *Marks* formula or Justice Stevens's approach, in most cases, Justice Kennedy's significant nexus test will play at least some role in determining CWA jurisdiction.⁴⁶ As a result, while the rationale underlying Justice Stevens's test is more logical than that underlying *Marks*, both methods will render the same result: lower courts will at least *consider* the significant nexus test in determining CWA jurisdiction.⁴⁷ Ultimately, Justice Kennedy's lone concurring opinion will play a significant role in defining the CWA's reach.⁴⁸

In *United States v. Johnson*, the First Circuit undertook the daunting task of deciphering the fragmented *Rapanos* opinion. Mindful of the limitations of the *Marks* formula, it adopted the more reasonable approach to extracting the legal standard set forth in *Rapanos*. While the reach of the CWA remains unclear, Justice Stevens's instructions provide a workable starting point from which to evaluate the complicated issue.

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book at issue enjoyed such protection because it was not obscene. *Memoirs v. Attorney Gen. of Mass.*, 383 U.S. 413, 418 (1966) (plurality opinion) (reiterating standard for First Amendment protection). In contrast, in concurring opinions, two Justices held that the First Amendment protects *all* speech—both obscene and nonobscene. *Id.* at 427 (Douglas, J., concurring). The *Marks* Court examined *Memoirs* and held that the plurality opinion which limited First Amendment protection to nonobscene speech was the narrowest ground because it represented a subset of the two opinions. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (stating concurring justices concurred in judgment on broader ground); 467 F.3d at 63 (discussing *Marks* construing *Memoirs*).

43. See 467 F.3d at 64-65 (explaining Justice Stevens's rationale). Justice Stevens's approach easily translates to the *Rapanos* decision because it considers all arguments in order to find the common ground and to command a majority of votes. *Id.* at 64.

44. Compare *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (using *Marks* formula and holding Justice Kennedy's significant nexus test controlling), and *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029 (9th Cir. 2006) (employing *Marks* test and requiring courts only use Justice Kennedy's test), with *United States v. Cundiff*, 480 F. Supp. 2d 940, 944 (W.D. Ky. 2007) (invoking Justice Stevens's instructions and applying both plurality's and Justice Kennedy's test), and *Simsbury-Avon Preservation Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 226-27 (D. Conn. 2007) (following Justice Stevens's instructions and applying both plurality's and Justice Kennedy's test).

45. See *supra* note 28 and accompanying text (describing various outcomes of Justice Stevens's instructions); *supra* note 30 (discussing cases applying *Marks*).

46. See *supra* note 44 and accompanying text (pointing out courts using Justice Stevens's approach or *Marks* formula both apply significant nexus test); see also *supra* note 41 (describing courts using *Marks* formula and applying significant nexus test).

47. See *supra* note 32 and accompanying text (describing applications of Justice Stevens's approach); *supra* note 36 and accompanying text (discussing outcomes using Justice Stevens's approach).

48. See *Mank*, *supra* note 3, at 328-30 (discussing impact of Justice Kennedy's test in future cases).